Supreme Court, U.S.
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No. 96-702

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Janice Fay Faircloth, Evelyn D. Frederick,
Callweall W. Smiling,

Petitioners,

v.

THE LUNDY PACKING COMPANY,
ANNABELLE L. FETTERMAN, MABEL F. HELD,
TRUSTEES LUNDY PACKING COMPANY
STOCK OWNERSHIP PLAN, AND JOHN DOES,

Respondents,

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Brief In Opposition to Petition
For Writ of Certiorari

The Lundy Packing Company, Annabelle L. Fetterman and Mabel F. Held (Respondents) respectfully request that this Court deny the Petition For Writ of Certiorari filed by Callweall W. Smiling, Evelyn D. Frederick and Janice Fay Faircloth (Petitioners).

The Petition should be denied because (1) there is no actual conflict between the circuits on the Question Presented; (2) the Fourth Circuit's decision is correct and consistent with this Court's discussion of ERISA's notice and disclosure requirements in *Curtiss-Wright Corp. v. Schoonejongen*, 1555 S.Ct. 1223(1995), and (3) contrary to the suggestion in the Question Presented, it is undisputed that Petitioners received numerous "basic plan documents" describing the value of their benefits and confirming that the ESOP had received a tax determination letter and was bonded.

I. Statement of the Case

The Lundy Packing Company (Lundy) is a closely held corporation that produces and sells pork products.[1] It established the Lundy Packing Company Employee Stock Ownership Plan and Trust (the ESOP) in 1976. Employees are eligible to participate after one year of employment, and receive benefits upon the occurrence of defined events, such as disability or retirement. Lundy is the Plan Administrator of the ESOP.

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[1]In accordance with Rule 29.6, The Lundy Packing Company has no parent company. It has an ownership interest in L & H Farms, L.L.C. .

The ESOP is funded entirely by contributions from Lundy. In 1992, approximately two thirds of the assets of the ESOP were invested in Lundy stock. The stock, which is not publicly traded, is valued by an independent appraiser each year. The independent appraiser furnishes a report which shows the analysis used to arrive at the fair market value of the stock. The report contains confidential information about Lundy, including number of shares outstanding, shareholder's equity, book value per share and earnings per share.

The fair market value determined by the independent appraiser is communicated to participants at the annual employee meeting. At that meeting, each participant receives a statement showing the value assigned to Lundy stock by the independent appraiser for the current and previous year, as well as the value of Lundy stock and other assets in their ESOP account.[2]

The stock valuation for 1992, prepared by InterState Johnson Lane, reflected a sharp decline in the value of Lundy stock. This decline was because Lundy's profits were low. The stock value decline, the reasons for the decline, and the impact of the stock value on ESOP

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[2]Petitioners erroneously describe the situation in 1992 when they state that they "received statements from Lundy indicating that the value of their benefits under [the ESOP] had dropped 42% from June 29, 1991 to July 4, 1992." In fact, the Lundy stock dropped 42% in value, but petitioners' benefits dropped by only 28% because only about two thirds of the ESOP assets were invested in Lundy stock. In addition, petitioners are wrong when they state that "the reason for the precipitous decline in the value of their account was because Respondent had valued Lundy stock at only 58% of the value assigned in the prior plan year." In fact, each participant, including petitioners, received a statement of account from Lundy showing that the decline was due to the independent appraiser's reduced valuation.

accounts were explained in the annual meeting, and at numerous "question and answer" meetings arranged by Lundy. Although Petitioners attended these meetings, they asked no questions about the ESOP, the stock valuation, or any of the numerous other documents which they seek in this lawsuit.

The ESOP did not sell or purchase Lundy stock in any transactions with Lundy, plan fiduciaries, majority stockholders or other parties in interest during the 1991-92 Plan Year, or for many years prior to then.

By letters to the Plan Administrator, Petitioners requested fifteen categories of documents, pursuant to Section 104(b)(4) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1024(b)(4). Petitioners did not ask any substantive questions about the ESOP, the stock value or their benefits, but merely itemized documents they wanted. In response, Lundy provided the following documents: the Plan, the Trust Agreement, the Summary Plan Description, the last three Summary Annual Reports, and the last three Annual Reports, including financial statements for the ESOP.

Petitioners ask this Court to overturn the Fourth Circuit's decision that on the facts of this case, ERISA does not compel plan administrators to provide participants with four categories of documents upon request: (1) the IRS letter confirming that the ESOP documents conform to the requirements of Internal Revenue Code; (2) the bonding policy insuring the ESOP; (3) a stock valuation report from the independent appraiser and (4) corporate financial statements and other data furnished to the independent appraiser.

Section 104(b)(4) requires the Plan Administrator to furnish, upon the written request of a participant, "the latest updated summary plan description, plan description, and the latest annual report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The documents Petitioners seek are not specifically identified in the statute, and come within its purview, if at all, only if they are "other instruments under which the Plan is established or operated." The Fourth Circuit correctly interpreted this phrase as encompassing "formal or legal documents under which a plan is set up or managed". *Faircloth v. The Lundy Packing Company,* 91 F.3d 648, 654 (4th Cir. 1996).

II. Reasons For Denying the Petition

Although the Question Presented suggests that the Fourth Circuit ignored settled precedent, denying Petitioners access to "basic plan documents" and important information about their benefits, the record and decision below conclusively demonstrate that no such miscarriage of justice occurred. ERISA Section 104(b)(4) specifically requires disclosure of basic plan documents such as the Plan and the Annual Report filed with the Department of Labor. Lundy gave Petitioners the documents specifically identified in Section 104(b)(4), and those documents contained specific information about the value of benefits, the tax-qualified status of the ESOP and that the fiduciaries were bonded.

Petitioners ask the Court to create an amorphous and impractical standard which would require Plan Administrators to furnish virtually every document having anything to do with an ESOP or the Settlor's business affairs. The Fourth Circuit correctly declined to adopt

Petitioner's interpretation, instead following this Court's lead in *Curtiss-Wright Corp. v. Schoonejongen*, by interpreting the statute according to its plain meaning. The decision below is not in direct conflict with any other circuit court, and review by this Court is unwarranted.

A. There Is No Clear Conflict Among The Circuits On The Interpretation Of ERISA Section 104(b)(4) Or 404(a)(1)(A).

Petitioners attempt to create a conflict between the decision below and *Hughes Salaried Retirees Action Committee v. Administrator of the Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), cert. denied, 116 S.Ct. 1676(1996) and *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994). However, there is no clear and well defined conflict between these cases. Neither *Hughes* or *Bartling* presents the same or even analogous facts as those involved in the instant case, and the dicta discussion of the Sixth and Ninth Circuits on the scope of ERISA Section 104(b)(4) is too attenuated to warrant certiorari review. No other circuit has ruled on whether ERISA Section 404(a), 29 U.S.C. § 1104(a)(1)(A)[3], enlarges the

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[3]Section 404(a)(1)(A) provides, in pertinent part, as follows:

> Subject to [exclusions not applicable here] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits of participants; and beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

scope of Section 104(b)(4), and therefore that aspect of the Question Presented is also not ripe for review.

1. *Bartling* and *Hughes* Are Factually Distinguishable From This Case.

There is no direct conflict between *Bartling*, *Hughes* and the decision below on the scope of Section 104(b)(4) because the participants in *Bartling* and *Hughes* did not seek the type of documents at issue here. Subsequent decisions may well reveal that there is no substantial conflict between the circuits. Review at this point would be premature.

The *Bartling* court did not decide whether annual stock appraisal reports prepared for an ESOP which holds stock in a closely held corporation must be disclosed under Section 104(b)(4). The plan at issue there was not an ESOP, but was a defined benefit plan. The participants in *Bartling* sought the actuarial report required by ERISA Section 103(d), 29 U.S.C. § 1023(d). Section 103 requires every plan to prepare a comprehensive analysis known as the "Annual Report". The Annual Report for a defined benefit plan must contain a "complete actuarial statement" which includes current value of plan assets, present value of nonforfeitable benefits for participants, the actuarial assumptions used for that present value analysis; and certification of contributions needed to reduce any accumulated funding deficiency. 29 U.S.C. § 1023(d). The *Bartling* court found that because Section 103 of ERISA specifically required this report[4], it was a

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[4]The "valuation report" sought by petitioners in this case is not part of the actuarial report described in Section 103(d). ESOPs are

(continued...)

document "under which the plan was . . . operated within the meaning of 104(b)(4)". 29 F.3d at 1070.

Bartling did not directly address or indirectly comment on whether Section 104(b)(4) encompasses the documents at issue here. The Sixth Circuit provided little discussion of its rationale, but the reasoning expressed would not require a plan administrator to produce the documents Petitioners seek. Unlike the actuarial report, which ERISA expressly requires as part of the Annual Report, a tax qualification letter, the bonding policy, the valuation analysis of closely held stock which is an ESOP asset, or the corporate financial data used by the appraiser are not mentioned in ERISA Section 103, and need not be included as part of the Annual Report.

Similarly, *Hughes* does not involve participant requests for the documents at issue here, and thus does not present a square conflict. In *Hughes*, the participants sought a list of the names and addresses of all retired participants. Not only is the case factually dissimilar, but the Ninth Circuit's holding on the scope of Section 104(b)(4) is not necessarily inconsistent with that of the court below. In reversing the panel opinion, the en banc *Hughes* court held only that the "other instruments clause" of Section 104(b)(4) "is limited to documents that are similar in nature to the documents specifically listed in § 104(b)(4)." 72 F.3d at 691. There is not enough similarity between a list of retired participants and the documents at issue here to reliably predict how the Ninth Circuit would rule on the facts of this case.

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[4](...continued)
individual account plans, which are excluded from Section 103(d). Unlike the actuarial report in *Bartling*, the stock valuation analysis at issue here is not part of the Annual Report.

It is sheer speculation to forecast that the Ninth or Sixth Circuit might interpret Section 104(b)(4) more broadly than the Fourth Circuit did in the case below. Certiorari should not be founded on speculation or dicta, but on clear and unavoidable conflicts.

2. No Other Circuit Has Ruled On The Section 404(a)(1)(A) Aspect of the Question Presented

There is unequivocally no conflict among the circuits on the second aspect of the question Petitioners present for review: whether the general fiduciary duty provision of ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) enlarges the scope of Section 104(b)(4) and requires disclosure of the documents. The decision below held that the general duty provisions in Section 404 did not add to the particularized language of Section 104(b)(4), which specifically addresses documents to be furnished to participants. *Bartling* did not discuss Section 404(a)(1)(A) at all. The *Hughes* Court expressly declined to rule on whether Section 404(a)(1)(A) enlarges the disclosure obligations of Section 104(b)(4). Consequently, the only circuit opinion discussing this issue is the Fourth Circuit's opinion in this case. As discussed below, that decision correctly interpreted ERISA in accordance with principles enunciated by this Court, and should not be disturbed.

B. The Fourth Circuit's Decision Is Correct And Consistent With This Court's Discussion Of ERISA Disclosure Provisions.

Review is also not needed because the Fourth Circuit applied correct statutory interpretation principles and its decision is wholly consistent with this Court's

interpretation of ERISA. In *Curtiss-Wright Corp. v. Schoonejongen*,115 S.Ct. 1223, 1229-30(1995), this Court said that Section 104(b)(4) required production of "governing plan documents". The Fourth Circuit followed this Court's teachings about statutory interpretation in both method and result. In *Curtiss-Wright Corp.*, the Court looked at the plain words of another section of ERISA, found them clear, and rejected attempts to add a "gloss" extrapolated from legislative history or to redefine the clear text by supplementing it with some other section of the statute. The decision below correctly applies these principles.

Petitioners' argument about participants' "right" to minutely inspect plan activities is nothing more than their own extrapolation of legislative history. The Fourth Circuit correctly rejected arguments based on asserted legislative purpose because the text of Section 104(b)(4) is clear. As this Court did when analyzing the term "procedure" in *Curtiss-Wright Corp.*, the Fourth Circuit looked to the ordinary meaning of the word "instrument." Finally, the court below rejected Petitioners' argument that Section 404(a)(1)(A) somehow expands fiduciaries' duty to produce documents not otherwise within the scope of Section 104(b)(4). It correctly declined to supplement the "informational scheme" Congress created with "a far away provision in another part of the statute." *Faircloth v. The Lundy Packing Company*, 91 F.3d at 657, quoting *Curtiss-Wright Corp.*, 115 S. Ct. 1223, 1231 (1995).

The Fourth Circuit's interpretation of the "other instruments" clause of Section 104(b)(4) is a workable definition consistent with the plain language of the statute. Requiring the documents which must be furnished at risk of penalties to be those "formal or legal documents under which the plan is set up or managed" fully and fairly

implements the disclosure scheme carefully laid out in ERISA. Certiorari is not needed to review this decision.

C. The Plan Documents Itemized In Section 104(b)(4) Give Participants Sufficient Information To Scrutinize The ESOP.

Petitioners evoke the spectre of dishonest ESOP administrators manipulating plan assets as justification for the broad disclosure standard they advocate. However, there is no factual support for this scenario, and the picture Petitioners paint is created of nothing more than speculation. No claim of improper dealings with ESOP stock was made in the case below. The record clearly establishes that no sales or purchases of stock have been made by the ESOP with Lundy or any other party-in-interest in many years. Moreover, this argument is a disingenuous distortion of the precisely detailed structure of ERISA's information disclosure scheme. The documents specifically identified in Section 104(b)(4) provide information which ensures that participants can check on the safety of their retirement benefits.

Petitioners were given a copy of the Plan and Trust document, which describes virtually every aspect of the ESOP's administration. Petitioners were given the Summary Plan Description, which contains a section describing the participants' rights under ERISA. Petitioners were also given copies of the ESOP's Annual Report, which includes the ESOP's audited financial statements, for the three years preceding their request. As required by ERISA Section 103(a) through (c), 29 U.S.C. § 1023(a)-(c), the Annual Report contained extensive and detailed information about the ESOP, and was signed "under penalties of perjury and other penalties." These documents, especially the Annual

Report, provide Petitioners with enough information to "police" the plan.

The Annual Report contains detailed information about the ESOP's financial status, including an itemized list of assets held by the ESOP for investment purposes, with the cost and market value of each asset. It describes the ESOP's assets and liabilities at the beginning and end of the relevant year and sets forth in detail the ESOP's income and expenses. The Accountant's Report on the Financial Statements also reviews assets, income and expenses of the ESOP, and confirms that the fair market value of Lundy stock is determined by an independent appraiser.

The Annual Report requires answers to a series of detailed questions about transactions with parties-in-interest, thus alerting participants if transactions with a risk of potential harm to the ESOP have occurred. Any sales by the ESOP to the employer, or purchases of stock from the employer, must be disclosed in the Annual Report. The Annual Report specifically requires disclosure of any unlawful transactions with parties-in-interest.

The Annual Report requires confirmation that an independent accountant has been retained to review the financial statements of the ESOP. Lundy specifically certified in the 1992 Annual Report that the accountant's report "including the financial statements and/or notes required to be attached" did not disclose:

(1) any errors or irregularities;

(2) illegal acts;

> (3) material internal control weaknesses;
>
> (4) a loss contingency indicating that assets are impaired or a liability incurred;
>
> (5) significant real estate or other transactions in which the plan and (A) the sponsor, (B) the plan administrator, (C) the employer(s), or (D) the employer organization(s) are jointly involved;
>
> (6) that the plan has participated in any related party transactions; or
>
> (7) any unusual or infrequent events or transactions occurring subsequent to the plan year end that might significantly affect the usefulness of the financial statements in assessing the plan's present or future ability to pay benefits.

All of this information, which Section 104(b)(4) ensures that participants receive on request, provides security against unlawful misuse or manipulation of plan assets. ERISA also contains specific prohibitions against such misuse and manipulation, and provides specific remedies if participants believe that a breach of fiduciary duty or prohibited transaction or improper calculation of their benefits has occurred. Yet Petitioners want to transform Section 104(b)(4) into an obligation to disclose virtually every document reflecting or affecting an ESOP sponsor's finances, operations and business plans.

Petitioners' argument is illogical. The stock valuation report would do nothing to help participants determine whether stock has been sold too cheaply (or bought too expensively) by the ESOP. The Annual Report, which is specifically listed in Section 104(b)(4), is

the document which discloses the price at which assets are bought and sold by the ESOP. In fact, Petitioner's emphasis on the stock valuation report is not matched in ERISA. ERISA does not describe any particular method for ESOP stock valuation, and does not mention stock valuation reports at all.[5]

Petitioners' claim that they need the bonding policy and tax qualification letter is also rebutted by the Annual Report. The Annual Report confirms that the ESOP is covered by a bond, and states the amount, and name of the surety company. Similarly, it states the date of the last IRS determination letter and that the ESOP qualifies under the Internal Revenue Code. The independent accountant also certifies in the financial statements for the ESOP that it qualifies under the Internal Revenue Code and is exempt from federal income taxes. There is no compelling reason to burden plan administrators with a requirement to furnish the bonding policy or tax qualification letter when the facts concerning these documents and their existence are spelled out in the Annual Report, and confirmed by the independent auditors.

ERISA Section 104(b)(4) does not require fiduciaries to provide documentation of their exercise of prudence and absence of malfeasance in every aspect of plan administration. For example, if Congress intended the plan administrator to provide documents concerning the value of non-public ESOP stock to all participants, it

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[5]Section 401(a)(28)(C) of the Internal Revenue Code, 26 U.S.C. § 401(a)(28)(C), requires valuations of employer securities which are not readily tradable to be done "by an independent appraiser."

could have included the term "appraisal" in Section 104(b)(4)'s list of designated documents. It did not, but instead required the provision of the Annual Report, which contains the pertinent information about the stock.

Petitioners' desire for a microscopic "audit" of the ESOP and the settlor's financial records goes far beyond the elaborate informational scheme already in place. Allowing the detailed review of corporate and plan documents which plaintiffs seek would create a heavy administrative burden on ESOPs and their corporate sponsors and permit indiscriminate dissemination of otherwise private business information. Such a drastic course of action should not be "read into" the statute by distorting the plain language, but should occur, if at all, through Congressional action.

III. Conclusion

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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